

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF WATER )  
TO VARIOUS WATER RIGHTS HELD BY OR FOR )  
THE BENEFIT OF A&B IRRIGATION DISTRICT, )  
AMERICAN FALLS RESERVOIR DISTRICT #2, )  
BURLEY IRRIGATION DISTRICT, MILNER )  
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )  
DISTRICT, NORTH SIDE CANAL COMPANY, )  
AND TWIN FALLS CANAL COMPANY )  
)  
(Water District Nos. 34, 110, 120, and 130) )  
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**FIFTH SUPPLEMENTAL  
ORDER AMENDING  
REPLACEMENT WATER  
REQUIREMENTS FINAL 2006  
& ESTIMATED 2007**

**Background**

On April 19, 2005, the Director of the Department of Water Resources (“Director” or “Department”) issued his order *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A & B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company*. These entities, or members, are collectively referred to herein as the “Surface Water Coalition” or “Coalition.” The Order of April 19, 2005, was amended on May 2, 2005 (herein referred to as the “May 2 Order”).

The May 2 Order included a determination that surface water rights held by or for the benefit of members of the Surface Water Coalition were reasonably likely to incur material injury in 2005 because of the diversion and consumptive uses of ground water under junior priority water rights. In response, the Director ordered ground water districts representing certain holders of junior priority ground water rights to provide replacement water pursuant to a plan submitted to the Department no later than April 29, 2005, or curtailment based on the priorities of the rights would be required to the extent mitigation for out-of-priority depletions was not provided.

In Finding 100 of the May 2 Order, the Director determined that:

The joint operating forecast prepared by the USBR [United States Bureau of Reclamation] and the USACE [United States Army Corps of Engineers] for unregulated inflow from the Upper Snake River Basin predicted for the Heise Gage for the period April 1 through July 31 . . . predicts an unregulated inflow of 2,340,000 acre-feet. . . . [T]he predicted inflow is similar to the measured, unregulated inflows at the Heise Gage for two recent years in the present sequence of drought years, 2002 and 2004.

For each member of the Surface Water Coalition, the Director: (1) averaged the 2002 and 2004 natural flow diversions; (2) estimated the 2005 storage allocation based on the average

of the volume of water stored after April 1, 2002, and after April 1, 2004, added to the volume of water actually in storage on April 1, 2005, less estimated 2005 evaporation; and (3) summed the average natural flow diversions and estimated 2005 storage allocations. The sum of natural flow diversions averaged for 2002 and 2004 and the estimated 2005 storage allocations based on the actual storage as of April 1, 2005, and the storage after April 1 averaged for 2002 and 2004 was deemed the predicted 2005 water supply for each Surface Water Coalition member.

For each Surface Water Coalition member, the predicted 2005 water supply was subtracted from the water supply in 1995, which was deemed the minimum full water supply needed. If the difference was greater than zero, the difference was the "Predicted Shortage in 2005." The total predicted shortage for 2005 for the members of the Surface Water Coalition that were predicted to incur shortages was 27,700 acre-feet.

Finding 119 of the May 2 Order established a reasonable amount of carryover storage at the end of 2005 for each member of the Surface Water Coalition "by averaging (1) the amounts of carryover storage required for Coalition members to have full supplies of water in 2006 if the divertible natural flow and storage accruals in 2006 are the same as in 2002 and (2) the amounts of carryover storage required for Coalition members to have full supplies of water in 2006 if the divertible natural flow and storage accruals in 2006 are the same as in 2004."

Finding 122 of the May 2 Order provided that "additional mitigation will be required if the predicted material injury is less than what is later determined to be the actual material injury, and credits against future mitigation requirements can be recognized if the predicted material injury is more than what is later determined to be the actual material injury."

The "Predicted 2005 Material Injury" for each member of the Surface Water Coalition was determined by summing the "Predicted Shortage in 2005," if any, and the amount, if any, that the predicted carryover storage at the end of 2005 was less than the reasonable carryover storage determined in Finding 119 of the May 2 Order. The total "Predicted 2005 Material Injury" for all of the members of the Surface Water Coalition, computed by summing the predicted injury for each of the members, was 133,400 acre-feet, 101,000 acre-feet of which was determined to be caused by the diversion and consumptive use of ground water under junior priority rights in Water District No. 120 and No. 130 based on simulations using version 1.0 of the Department's ground water model for the Eastern Snake Plain Aquifer ("ESPA").

Following issuance of the April 19 Order, the Idaho Ground Water Appropriators, Inc. ("IGWA") submitted its initial plan for replacement water on April 29, 2005, which was later amended ("2005 Replacement Water Plan") and approved by the Director on June 24, 2005. *Order Approving IGWA's Replacement Water Plan* (referred to hereafter as the "June 24 Approval Order"). IGWA's 2005 Replacement Water Plan, approved by the June 24 Approval Order, committed at least 27,700 acre-feet as replacement water for the Predicted Shortage in 2005.

Based on the final 2005 water rights accounting for Water District 01, in which water is distributed to the water rights held by or for the benefit of members of the Surface Water Coalition, the joint operating forecast prepared by the United States Bureau of Reclamation ("USBR") and the United States Army Corp of Engineers ("USACE") for unregulated inflow in

2006 from the Upper Snake River Basin predicted for the Heise Gage for the period April 1 through July 31, and the preliminary 2006 storage allocations for members of the Surface Water Coalition, the Director issued an order on June 29, 2006, stating that IGWA had provided 694 acre-feet of reach gain resulting from the lease and non-use of water rights held by FMC Idaho to the Twin Falls Canal Company during the 2005 irrigation season. *Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006* at p. 21 (hereinafter “June 29 Order”). The June 29 Order required that IGWA provide the remaining replacement water (27,006 acre-feet) by July 9, 2006. *Id.* at 22. IGWA complied with the terms of the Third Supplemental Order and authorized the Director to retrieve sufficient replacement water from sources that it had secured. *Fourth Supplemental Order on Replacement Water Requirements for 2005* (July 17, 2006) (hereinafter “July 17 Order”). The July 17 Order supplemented and amended the June 29 Order.

In addition to finalizing the extent of material injury suffered by members of the Surface Water Coalition during 2005, and requiring IGWA to provide the remainder of the 27,700 acre-feet of replacement water owed to Twin Falls Canal Company (27,006 acre-feet), the June 29 Order also predicted material injury to the Surface Water Coalition for 2006. Based on the Department’s review of available information, the Director concluded that members of the Surface Water Coalition would not be materially injured during the 2006 water year, and would have sufficient water available to meet their reasonable carryover needs. *June 29 Order* at p. 21.

In the June 29 Order, the Director predicted material injury based on a regression analysis of the years 1990 through 2005. The predicted material injury was estimated to be one standard deviation below the best-fit trendlines that were established in Attachments A through G for each member of the Surface Water Coalition in the June 29 Order. The use of one standard deviation below the best-fit trendlines resulted in a more conservative estimate of the natural flow that would be available to members of the Surface Water Coalition, causing an increase in the computed amount of predicted shortfall.

After issuance of the June 29 Order, but before the July 17 Order, the Surface Water Coalition sought a stay in the proceedings based upon entry of Judge Barry Wood’s *Order on Plaintiff’s Motion for Summary Judgment* (June 2, 2006) and *Order Certifying Judgment Granting Partial Summary Judgment Under Rule 54(b)* (July 11, 2006) in Case No. CV-2005-0000600 (Fifth Jud. Dist., Gooding County). While both the Surface Water Coalition and IGWA had filed petitions for reconsideration and requests for hearing on the May 2 and June 29 orders, based on entry of Judge Wood’s *Order Certifying Judgment Granting Partial Summary Judgment Under Rule 54(b)*, the Director suspended the hearing schedule to provide sufficient time to review the issues of reconsideration and request for stay. *Interim Order Suspending Hearing Schedule* (July 14, 2006).<sup>1</sup> The Interim Order Suspending Hearing Schedule specifically provided that “Suspension of the hearing schedule will not affect the Director’s orders requiring that IGWA provide the remaining replacement water required to mitigate material injury in 2005, the monitoring of water supply and climatic conditions through the 2006 irrigation season, or requirements for additional replacement water to mitigate material injury that may occur during the 2006 irrigation season.” *Id.* at p. 2.

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<sup>1</sup> Judge Wood’s decision granting summary judgment to the Surface Water Coalition was appealed and later reversed by the Idaho Supreme Court. *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007).

On February 23, 2007, the Surface Water Coalition renewed its original call with the Department for delivery of senior natural flow and storage water rights. Following the issuance of the Idaho Supreme Court's decision in *American Falls Res. Dist. No. 2* on March 5, 2007, the Department and parties to the Surface Water Coalition's delivery call participated in numerous, informal discussions regarding resolution of predicted natural flow and reasonable carryover shortages for 2007. On April 13, the Department received mitigation agreements from the Idaho Dairymen's Association and the Water Mitigation Coalition. On May 8, 2007, the Department received the *Ground Water Districts' Joint Replacement Water Plan for 2007*.

On May 10, 2007, the Director sent notification letters to affected ground water users warning of potential curtailment of ground water rights hydraulically connected to the Snake River in the American Falls area.

On May 15, the Department received the *Ground Water Districts' Amended Joint Replacement Water Plan for 2007* (hereinafter "2007 Replacement Water Plan"), which increased the amount of water committed by IGWA to mitigate for material injury caused by its member ground water districts. The 2007 Replacement Water Plan also requested reconsideration and a hearing on the May 2 Order, as well as all subsequent orders related thereto.

On May 21, 2007, the Surface Water Coalition filed its *Protest and Motion to Dismiss the Ground Water Districts' Amended Joint Replacement Water Plan for 2007* (hereinafter "Motion to Dismiss").

Based on the final 2006 water rights accounting for Water District 01, in which water is distributed to the water rights held by or for the benefit of members of the Surface Water Coalition, the joint operating forecast prepared by the USBR and the USACE for unregulated inflow in 2007 from the Upper Snake River Basin predicted for the Heise Gage for the period April 1 through July 31, and the preliminary 2007 storage allocations for members of the Surface Water Coalition, the Director enters the following Findings of Fact, Conclusions of Law, and Order, which supercede the *Third Supplemental Order Amending Replacement Water Requirements* of June 29, 2006, and *Fourth Supplemental Order Amending Replacement Water Requirements* of July 17, 2006.

## **FINDINGS OF FACT**

### **Final Determination of Presumed Injury for 2006**

1. The total shortage "predicted" for 2006 for the members of the Surface Water Coalition in the June 29 Order was zero (0) acre-feet. When combined with the "Reasonable Carryover" storage determined in the June 29 Order, the total "Predicted 2006 Material Injury" for members of the Surface Water Coalition was zero (0) acre-feet.

2. On June 21, 2006, maximum storage in the Upper Snake River Basin reservoirs had accrued. Final accounting on February 23, 2007, showed all reservoir accounts had filled to

100 percent by June 21, 2006. However, flood-control water was released past Milner prior to this date resulting in a 53,806.2 acre-foot reduction to Palisades' storage accounts and a 17,935.4 acre-foot reduction to Jackson storage accounts. As a result of the flood control releases, Palisades' 1939 water right had fill of 898,234 acre-feet (95.5 percent), and Palisades' winter-water-savings account had 247,960 acre-feet (95.5 percent) of fill. The Jackson Lake water rights had 829,065 acre-feet (97.9 percent) of fill.

3. On March 2, 2007, the final 2006 storage accruals for the benefit of the members of the Surface Water Coalition and reservoir evaporation were determined by Water District 01 as follows:

	2006 Max. Storage (acre-feet)	2006 Evap. (acre-feet)	Final 2006 Net Storage (acre-feet)
Jackson Lake:	829,065	17,593	811,472
Palisades Winter Water Savings:	247,960	5,262	242,698
Other Palisades Reservoir:	898,234	19,060	879,174
Henrys Lake:	90,000	1,910	88,090
Island Park Res. & Grassy Lake:	150,204 <sup>2</sup>	3,187 <sup>2</sup>	147,017 <sup>2</sup>
Ririe Reservoir:	80,500	1,708	78,792
Amer. Falls Winter Water Sav.:	156,830	3,328	153,502
Other American Falls:	1,515,760	32,164	1,483,596
Lake Walcott:	95,200	2,020	93,180
Totals:	4,063,753	86,232	3,977,521

<http://www.waterdistrict1.com/WD01%20Storage%20Report.pdf> (last visited May 22, 2007).

4. Using the Department's accounting program for storage, Water District 01 determined the final 2006 storage allocations on March 2, 2007, for the members of the Surface Water Coalition as follows:

	Final 2006 Storage Allocations (acre-feet)
A&B Irrigation District:	130,721
American Falls Res. Dist. #2:	385,199
Burley Irrigation District:	219,961
Milner Irrigation District:	85,787
Minidoka Irrigation District:	353,384
North Side Canal Company:	830,067
Twin Falls Canal Company:	238,697

<sup>2</sup> Grassy Lake included in Island Park storage and evaporation.

5. Using the Department's water rights accounting program, Water District 01 determined the following final diversions of surface water from the Snake River by members of the Surface Water Coalition as of the end of the 2006 irrigation season (October 31, 2006) on February 23, 2007, as follows:

	Final 2006 Natural Flow (acre-feet)	Final 2006 Storage (acre-feet)	Final Total 2006 Diversions (acre-feet)	Minimum Full Supply Needed <sup>3</sup> (acre-feet)
A&B Irrigation District:	16,081	41,410	57,491	50,000
American Falls Res. Dist. #2:	126,703	277,517	404,220	405,600
Burley Irrigation District:	124,785	123,063	247,848 <sup>4</sup>	220,200 <sup>5</sup>
Milner Irrigation District:	19,592	35,905	55,497	50,800
Minidoka Irrigation District:	177,358	174,910	352,268 <sup>6</sup>	314,300 <sup>7</sup>
North Side Canal Company:	484,164	484,395	968,559	988,200
Twin Falls Canal Company:	806,285	189,537	995,822	1,075,900

6. The final total 2006 diversions, as set forth above, are greater than the minimum full supply needed, as set forth in Finding 116 of the May 2 Order and the above finding, by each member of the Surface Water Coalition, other than American Falls Reservoir District No. 2, North Side Canal Company and Twin Falls Canal Company.

7. The fact that American Falls Reservoir District No. 2, North Side Canal Company and Twin Falls Canal Company diverted less water in 2006 than the minimum full supply determined to be needed indicates that not as much water was generally needed by those members of the Coalition in 2006 in the early irrigation season during March and April. This was likely due to the higher than normal winter precipitation and subsequent above normal soil moisture conditions. Or Coalition members may have sought to conserve available storage water

<sup>3</sup> Water rights held by or for the benefit of members of the Surface Water Coalition entitle the diversion of up to the full quantities of water authorized by the respective rights when needed for the full beneficial use defined under the rights. For a variety of reasons (e.g., cropping patterns, changes in irrigation methods, reductions in irrigated acreage, weather, etc.) the full quantities of water authorized by the respective rights are often not needed, and junior priority rights are not subject to curtailment to provide for the differences, if any, between the maximum quantities of water authorized by the rights and the lesser quantities of water actually needed. The Director determined that 1995 was the most recent year that the members of the Surface Water Coalition received a water supply sufficient for the beneficial uses made under the respective rights and, based on available information, used the amounts of water diverted during the 1995 irrigation season as measures of the quantities of water needed for current conditions (herein termed "minimum full water supply"), while recognizing that amounts of water up to the maximum quantities authorized by the water rights held by or for the benefit of the Coalition could be demanded upon a showing of need. To date, the Surface Water Coalition has not shown such need.

<sup>4</sup> 41.3 percent of total Minidoka Project diversions.

<sup>5</sup> 41.2 percent of total Minidoka Project diversions for the 1995 irrigation year from Water District 01 report.

<sup>6</sup> 58.7 percent of total Minidoka Project diversions.

<sup>7</sup> 58.8 percent of total Minidoka Project diversions for the 1995 irrigation year from Water District 01 report.

out of concern that supplies might not be adequate given the above normal temperatures and below normal precipitation in the long range forecast for August, September, and October issued periodically by the National Weather Service Climate Prediction Center. Generally, water not diverted during the irrigation season would be stored or remain in storage if previously diverted to storage, either of which would increase the storage available to reservoir storage spaceholders in the Upper Snake River Basin, including members of the Surface Water Coalition.

8. Determination of presumed material injury<sup>8</sup> in 2006 to rights held by or for the benefit of members of the Surface Water Coalition resulting from depletions to the Snake River caused by the diversion and use of ground water under junior priority water rights, if any, cannot be based solely on the quantities of water diverted but must also take into account the amounts of carryover storage for the various members of the Coalition.

9. Based on the final storage allocations set forth in Finding 4, the final amounts of storage water diverted set forth in Finding 5, and rental pool or other adjustments documented in the storage report dated March 2, 2007, resulting from the Department's accounting program for storage, the following are the final amounts of carryover storage at the end of the 2006 irrigation season:

	Final 2006 Storage Alloc. (acre-feet)	Final 2006 Storage Used (acre-feet)	Final 2006 Rental/Adjust. (acre-feet)	Final 2006 Carryover Storage (acre-feet)
A&B Irrigation District:	130,721	41,410	0	89,311
American Falls Res. Dist. #2:	385,198	277,517	0	107,681
Burley Irrigation District:	219,961	123,063	5,975	102,873
Milner Irrigation District:	85,787	35,905	8,874	58,756
Minidoka Irrigation District:	353,384	174,910	4,138	182,612
North Side Canal Company:	830,067	484,395	20,000	365,672
Twin Falls Canal Company:	238,697	189,537	29,402	78,562

10. The final 2006 presumed material injury, if any, for members of the Surface Water Coalition, is determined by subtracting the sum of the total 2006 diversions (set forth in Finding 5 above) and the preliminary carryover storage (set forth in Finding 9 above) from the sum of the minimum full water supply needed (set forth in Finding 5 above) and the reasonable carryover storage (set forth in Finding 119 of the May 2 Order). The final 2006 presumed material injury, if any, for members of the Coalition is set forth on the next page as follows:

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<sup>8</sup> The material injury presumed by the Director was based on available information, and the amount of water corresponding to the injury was presumed to be needed in 2006 and subsequent years. During the proceedings, members of the Surface Water Coalition or the holders of affected junior priority ground water rights have the opportunity to demonstrate that more or less water is needed than the minimum full supply determined by the Director and the actual material injury is more or less than presumed.

	Minimum Full Supply Needed <sup>3</sup> (acre-feet)	Reasonable Carryover (acre-feet)	Final Total 2006 Diversions (acre-feet)	Final 2006 Carryover (acre-feet)
A&B Irrigation District:	50,000	8,500	57,491	89,311
American Falls Res. Dist. #2:	405,600	51,200	404,220	107,681
Burley Irrigation District:	220,200 <sup>4</sup>	0	247,848	102,873
Milner Irrigation District:	50,800	7,200	55,497	58,756
Minidoka Irrigation District:	314,300 <sup>6</sup>	0	352,268	182,612
North Side Canal Company:	988,200	83,300	968,559	365,672
Twin Falls Canal Company:	1,075,900	38,400	995,822	78,562

	Minimum Full Supply Needed + Reas. Carryover (acre-feet)	Final Total 2006 Diversions + Carryover (acre-feet)	Final 2006 Presumed Shortages and Material Injury (- is surplus, no shortage) (acre-feet)
A&B Irrigation District:	58,500	146,802	-88,302
American Falls Res. Dist. #2:	456,800	511,901	-55,101
Burley Irrigation District:	220,200	350,721	-130,521
Milner Irrigation District:	58,000	114,253	-56,253
Minidoka Irrigation District:	314,300	534,880	-220,580
North Side Canal Company:	1,071,500	1,334,231	-262,731
Twin Falls Canal Company:	1,114,300	1,074,384	39,916

11. The Final 2006 Presumed Shortages and Material Injury of 39,916 acre-feet for the Twin Falls Canal Company was calculated as follows: Minimum Full Supply Needed (1,075,900) + Reasonable Carryover (38,400) = Minimum Full Supply Needed and Reasonable Carryover (1,114,300). Minimum Full Supply Needed and Reasonable Carryover (1,114,300) – Final Total 2006 Diversions (995,822) – Final 2006 Carryover (78,562) = Final 2006 Presumed Shortages and Material Injury (39,916).

12. While the calculation of Twin Falls Canal Company's Final 2006 Presumed Shortages and Material Injury appears as a positive number, which would indicate material injury, Finding 10 presumed that each member of the Surface Water Coalition would divert its minimum full supply in 2006. Due to conditions in 2006, *see* Finding 7, the Twin Falls Canal Company diverted 80,078 acre-feet less than its minimum full supply (1,075,900) and carried over 40,162 acre-feet more than its reasonable carryover storage supply (38,400). Therefore, as predicted in the June 29 Order, Twin Falls Canal Company was not materially injured in 2006.

### **Material Injury Predicted for 2007**

13. Whether effects of ground water depletions result in material injury to the senior priority surface water rights held by the members of the Surface Water Coalition in a particular year depends in large part on the total water supply, under natural flow water rights and from

reservoir storage, and in some instances supplemental ground water rights, otherwise available to each member of the Coalition in that year.

14. The USBR and USACE jointly prepare operating forecasts for unregulated inflow from the Upper Snake River Basin projected for the Heise Gage beginning soon after January 1 of each year. The Heise Gage location is the most representative location for overall surface water supply conditions in the Upper Snake River Basin. The USBR and USACE jointly issue forecasts each year for unregulated inflow at the Heise Gage after April 1, for the period April 1 through July 31, which is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.

15. The United States Natural Resources and Conservation Service ("NRCS") operates and maintains Snotel sites that measure and record snowpack conditions throughout the western United States that are used to develop forecasts for inflow to various river systems and for other purposes. The USBR and USACE use the NRCS Snotel sites in the Upper Snake River Basin to develop inflow forecasts. The joint operating forecast prepared by the USBR and the USACE for unregulated inflow from the Upper Snake River Basin predicted for the Heise Gage for the period April 1 through July 31, 2007, predicts an unregulated inflow of 2,370,000 acre-feet. The actual, measured inflow from April 1, 2007, through July 31, 2007, will likely be different than the predicted inflow of 2,370,000 acre-feet.

16. The amount of unregulated inflow that may be divertible under the water rights held by members of the Surface Water Coalition and the amount of water that may be divertible to storage in the reservoirs operated by the USBR for the benefit of the members of the Coalition can be highly variable and depends on climatic conditions and when water rights authorizing diversions from the Snake River are in priority.

17. Attachments A through G show correlations between measured, unregulated inflows at the Heise Gage for the period April 1 through July 31, as well as the amounts of natural flow historically diverted by each of the members of the Surface Water Coalition for the years 1990 through 2006.

18. Predicting the amount of natural flow that may be divertible in 2007 under the water rights held by individual members of the Surface Water Coalition based on what was historically divertible is uncertain because it is unlikely that the climatic conditions and the resulting portion of the inflow divertible by individual members of the Coalition will be exactly the same in 2007 as in any prior particular year. While acknowledging the uncertainty in predicting the amount of natural flow that may be divertible in 2007 under the water rights held by individual members of the Coalition, the predicted unregulated flow of 2,370,000 acre-feet from April 1 through July 31, 2007, at Heise together with the regression relationships that are one standard deviation below the best-fit trendlines in Attachments A through G for each member of the Coalition provide a conservative estimate of the natural flow that may be divertible in 2007 by each member of the Coalition.

19. Using the predicted unregulated flow of 2,370,000 acre-feet from April 1 through July 31, 2007, at Heise, with the regression relationships that are one standard deviation below

the best-fit trendlines in Attachments A through G, results in the following predicted natural flow available during the 2007 irrigation season to each member of the Surface Water Coalition:

Predicted 2007  
Natural Flow Diversions  
(acre-feet)

A&B Irrigation District:	2,004
American Falls Res. Dist. #2:	28,583
Burley Irrigation District:	107,337
Milner Irrigation District:	4,759
Minidoka Irrigation District:	90,090
North Side Canal Company:	312,009
Twin Falls Canal Company:	778,285

20. Similar to predicting the amount of natural flow that may be divertible in 2007, predicting the volume of water that may be storable in the reservoirs operated by the USBR for the benefit of the members of the Surface Water Coalition based on what was historically storable in a specific year is uncertain because, as for divertible natural flow, it is unlikely that the climatic conditions and the resulting portion of the inflow divertible to storage will be the same in 2007 as in any prior particular year. While acknowledging the uncertainty in predicting the amount of unregulated inflow that may be storable in 2007 under the water rights held by the USBR, using the 2006 storage right accruals for all reservoirs except Ririe provides a reasonable estimate of storage water for Coalition members in 2007. All storage accounts filled in 2006, except for flood control release, and all storage accounts are predicted to fill in 2007, given the snow survey data and the carryover storage available in all reservoirs except Ririe. For Ririe reservoir, a good approximation of the 2007 storage accrual is obtained by selecting 1994 as a similar year with fill volumes on April 1 equaling April 1, 2007, fill volumes. The inflow stored in Ririe reservoir after April 1, 1994, is added to the actual storage as of April 1, 2007, to obtain an estimated fill for Ririe Reservoir in 2007. Since 2007 is predicted to have above normal temperatures, similar to 2006, estimated evaporation from 2006 is used to reduce the 2007 reservoir storage accruals. This results in the following maximum storage predicted for 2007, adjusted for estimated evaporation:

	2007 Max. Storage (acre-feet)	2007 Evap. (acre-feet)	Preliminary 2007 Net Storage (acre-feet)
Jackson Lake:	829,100	17,591	811,509
Palisades Winter Water Savings:	898,200	19,057	879,143
Other Palisades Reservoir:	248,000	5,262	242,738
Henrys Lake:	90,000	1,910	88,090
Island Park Res. & Grassy Lake:	150,200 <sup>9</sup>	3,187 <sup>10</sup>	147,013 <sup>10</sup>
Ririe Reservoir:	70,000	1,485	68,515
Amer. Falls Winter Water Sav.:	156,830	3,328	153,502
Other American Falls:	1,515,760	32,160	1,483,600
Lake Walcott:	95,200	2,020	93,180
Totals:	4,053,290	86,000	3,967,290

21. Using the Department's accounting program for storage, the preliminary maximum storage, less estimated evaporation for 2007, was allocated among all reservoir storage spaceholders in the Upper Snake River Basin, which resulted in the following preliminary storage allocations for members of the Surface Water Coalition. When the preliminary storage allocations are added to the natural flow predicted to be available for the 2007 irrigation year, as set forth in Finding 19, the predicted total supply for each member of the Coalition is considered to be a reasonably likely projection of the total amount of water that may be available to each member of the Coalition during the 2007 irrigation year, subject to variations in water supply conditions and variations caused by climatic conditions, for the limited purpose of assessing reasonably likely material injury caused by the diversion and use of ground water under junior priority rights. The reasonably likely predicted total supply for the 2007 irrigation year for each member of the Coalition is as follows:

	2007 Natural Flow (acre-feet)	2007 Storage (acre-feet)	Total 2007 Supply (acre-feet)
A&B Irrigation District:	2,004	130,718	132,722
American Falls Res. Dist. #2:	28,583	385,200	413,783
Burley Irrigation District:	107,337	219,960	327,297
Milner Irrigation District:	4,759	85,786	90,545
Minidoka Irrigation District:	90,090	353,392	443,482
North Side Canal Company:	312,009	830,100	1,142,109
Twin Falls Canal Company:	778,285	238,701	1,016,986

22. To predict the shortages in surface water supplies that are reasonably likely for members of the Surface Water Coalition for the 2007 irrigation year, if any, the amounts of water diverted for the 1995 irrigation year, as described in the May 2 Order, are deemed to be the minimum amounts needed for full deliveries to land owners and shareholders. If crop evapotranspiration is greater in 2007, or precipitation during the irrigation season is less than in 1995, the amounts of water diverted in 1995 may be less than what is needed for a full supply in

<sup>9</sup> Grassy Lake included with Island Park Reservoir.

2007. If crop evapotranspiration is less in 2007, or precipitation during the irrigation season is greater than in 1995, the amounts of water diverted in 1995 may be more than what is needed for a full supply in 2007.

23. The shortages in surface water supplies that are reasonably likely for members of the Surface Water Coalition in 2007 are estimated by subtracting the reasonably likely total supplies of natural flow and storage for the 2007 irrigation year, set forth in Finding 21, from the minimum amounts needed for full deliveries based on diversions in 1995 as follows:

	Minimum Full Supply Needed (acre-feet)	Predicted 2007 Supply (acre-feet)	Predicted Shortages in 2007 (- is surplus) (acre-feet)
A&B Irrigation District:	50,000	132,722	-82,722
American Falls Res. Dist. #2:	405,600	413,783	-8,183
Burley Irrigation District:	220,200 <sup>10</sup>	327,297	-107,097
Milner Irrigation District:	50,800	90,545	-39,745
Minidoka Irrigation District:	314,300 <sup>11</sup>	443,482	-129,182
North Side Canal Company:	988,200	1,142,109	-153,909
Twin Falls Canal Company:	1,075,900	1,016,986	58,914 <sup>12</sup>

24. As set forth above, the only member of the Surface Water Coalition that is predicted to experience material injury in 2007 is the Twin Falls Canal Company. The predicted material injury to Twin Falls Canal Company is 58,914 acre-feet during the 2007 irrigation season.

25. Based on the Department's water rights data base and version 1.1 of the ground water model for the ESPA, if voluntary mitigation were not to occur, involuntary curtailment of junior ground water rights in Water District Nos. 34, 110, 120, and 130 would be necessary to account for the 2007 predicted material injury of 58,914 acre-feet to the Twin Falls Canal Company. Involuntary curtailment would shut down approximately 900 ground water rights for irrigation, commercial, industrial, municipal, non-exempt domestic and stockwater, and other consumptive uses. Non-consumptive and culinary in-house uses of water would not be subject to curtailment. The reasonably likely material injury predicted for 2007 is the sum of the shortages set forth above, and the shortfalls in predicted carryover as compared to the reasonable amounts of carryover storage set forth in Finding 119 of the May 2 Order. As set forth on the next page, the following are the predicted amounts of injury and ending carryover storage for 2007 for members of the Surface Water Coalition:

<sup>10</sup> 41.2 percent of total Minidoka Project diversions for the 1995 irrigation year from Water District 01 report.

<sup>11</sup> 58.8 percent of total Minidoka Project diversions for the 1995 irrigation year from Water District 01 report.

<sup>12</sup> The calculated material injury is 58,913.7 acre-feet. For purposes of this order, that number has been rounded to 58,914.

	Predicted 2007 Material Injury Shortages + Carryover Shortfalls (acre-feet)	Predicted 2007 Carryover <sup>13</sup> (acre-feet)
A&B Irrigation District:	0	82,722
American Falls Res. Dist. #2	43,017	51,200
Burley Irrigation District:	0	107,097
Milner Irrigation District:	0	39,745
Minidoka Irrigation District:	0	129,182
North Side Canal Company:	0	83,300
Twin Falls Canal Company:	97,314	38,400
Totals:	140,331	531,646

26. As set forth above, the predicted carryover shortfalls are 43,017 acre-feet for the American Falls Reservoir District No. 2, and 38,400 acre-feet (97,314 less 58,914) for the Twin Falls Canal Company.

#### **Mitigation Agreements and Impact on Predicted Material Injury for 2007**

27. On April 13, 2007, the Department received agreements to mitigate depletions caused by participant members of the Idaho Dairymen's Association ("IDA") and the Water Mitigation Coalition ("WMC"), comprised of the J.R. Simplot Company, Basic American Foods, a division of Basic American, Inc., and ConAgra Foods Packaged Foods Company, Inc., d/b/a Lamb-Weston. Hereinafter, the agreements shall be know as the "IDA Agreement" and the "WMC Agreement," respectively.

28. Parties to the IDA Agreement include the IDA and signing members, the Thousand Spring Water Users Association and signing members, Clear Springs Foods, Inc., and members of the Surface Water Coalition. According to the IDA Agreement, mitigation would be achieved by drying up acres or conveying rented storage water through the North Side Canal Company system. The IDA Agreement intends to mitigate for the depletion of water pumped from the ESPA for dairy cattle and milk production facilities. Under the IDA Agreement, mitigation was calculated at 29.1 gallons of water per day for each mature cow. Mitigation would be phased-in as follows: 25% mitigation within 12 months; 60% mitigation within 18 months; and 100% mitigation within 24 months. The IDA Agreement states that it will remain in effect until senior rights are fully satisfied for five consecutive years, unless terminated by the IDA upon the joining of another approved mitigation plan.

29. Parties to the WMC Agreement include the WMC, the Senior Water Coalition, comprised of members of the Surface Water Coalition and Clear Springs Foods, Inc., and the Minidoka Irrigation District ("MID"). According to the WMC Agreement, mitigation would be achieved by annual rentals of 10,000 acre-feet of MID storage water, when available, through the

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<sup>13</sup> Excluding rental pool leases.

Upper Snake Rental Pool, to be delivered to members of the Senior Water Coalition. If MID's storage water supply is less than 275,000 acre-feet on June 1<sup>st</sup> of any given year, MID need not lease the water, and the WMC must instead pay a predetermined equivalent water rental fee to members of the Senior Water Coalition. The term of the WMC Agreement is 20 years.

30. On May 8, 2007, the Department received the *Ground Water Districts' Joint Replacement Water Plan for 2007*, which was modified on May 15, 2007, by the *Ground Water Districts' Amended Joint Replacement Water Plan for 2007* (hereinafter "2007 Replacement Water Plan"). The 2007 Replacement Water Plan stated that it would "mitigate any and all material injury by guaranteeing and underwriting Twin Falls Canal Company's irrigation season supply . . . ." *2007 Replacement Water Plan* at p. 8. The amount guaranteed by IGWA, through its 2007 Replacement Water Plan, is 1,075,900 acre-feet, the amount identified in Finding 23 as Twin Falls Canal Company's minimum full supply. The 2007 Replacement Water Plan states that IGWA will provide replacement water to guarantee a full supply up to 1,075,900 acre-feet through "leases from Aberdeen-Springfield Canal Company (20,000 acre-feet), FMC (5,000 acre-feet) and Snake River Irrigation District (10,000 acre-feet). To the extent this water is not used to supply water under the North Snake Ground Water District and Magic Valley Ground Water Districts Joint Replacement Water Plan for 2007 for Water District 130, it will be dedicated to this proposed 2007 Joint Replacement Water Plan. In addition, water from storage water available under other leases is being negotiated. If the above-described sources are inadequate to off-set the water debt and to the extent necessary, the Ground Water Districts will reimburse Twin Falls Canal Company for any actual seasonal water supply shortfall at the Water District 1 Rental Pool rate for the 2007 season." *Id.* at p. 10.

31. The 2007 Replacement Water Plan also requested reconsideration and a hearing on the May 2 Order, as well as all subsequent orders related thereto.

#### **Surface Water Coalition's Protest and Motion to Dismiss IGWA's 2007 Replacement Water Plan**

32. On May 21, 2007, the Surface Water Coalition filed its *Protest and Motion to Dismiss the Ground Water Districts' Amended Joint Replacement Water Plan for 2007* (hereinafter "Motion to Dismiss"). According to the Surface Water Coalition, Idaho law and the Department's administrative rules do not contemplate replacement water plans; therefore, the 2007 Replacement Water Plan should be dismissed. Second, the Surface Water Coalition states that because the Director has not issued an order quantifying material injury to the members of the Surface Water Coalition, the 2007 Replacement Water Plan is premature. Additionally, the Surface Water Coalition requests that the Director advise the Coalition whether "full headgate deliveries" in 2007 will be provided; whether carryover storage for 2008 will be realized; that curtailment occur if sufficient water cannot be provided for in-season use in 2007 and reasonable carryover storage in 2008; that the Department provide a list of all ground water rights in Water District No. 120 and a calculation of the total volume pumped from the ESPA to date; and that the Department conduct ESPA-wide aquifer water level measurements in 2007.

33. The Surface Water Coalition also requests an "immediate hearing and opportunity for oral argument and testimony on this motion to dismiss IGWA's Replacement Plan." *Motion*

to Dismiss at p. 19. Finally, the Surface Water Coalition argues that if the Director does not “hold a hearing and/or denies the Coalition’s motion and approves IGWA’s Replacement Plan, the Coalition requests the Director to certify such an order as final so that immediate judicial review can be obtained.” *Id.*

## CONCLUSIONS OF LAW

1. Conclusions of Law set forth in the May 2 Order, as well as all subsequent orders related thereto, as applicable, are incorporated into this order. All findings of fact in this order later deemed to be conclusions of law are hereby made as conclusions of law.

2. Based on the Final 2006 Presumed Shortages and Material Injury, the only member of the Surface Water Coalition that appeared to be materially injured in 2006 was the Twin Falls Canal Company. However, as stated previously in Findings 10, 11, and 12, the Twin Falls Canal Company was not materially injured in 2006.

3. The predicted material injury of 58,914 acre-feet to the Twin Falls Canal Company in 2007 was to have been offset in 2005 and subsequent years, separately or in combination, through either the curtailment of the diversion and use of certain junior priority ground water rights within Water District Nos. 34, 110, 120, and 130, or through the provision of replacement water to the Twin Falls Canal Company on an annual basis in amounts and generally at times at least equal to the increase in reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage that would have resulted from curtailment, based on simulations using the Department’s ground water model for the ESPA (version 1.1), until reservoir storage space held by the Twin Falls Canal Company refills.<sup>14</sup> The reservoir storage space held by the Twin Falls Canal Company filled in 2006.

4. As stated in the Findings of Fact, the only member of the Surface Water Coalition that is predicted to experience material injury during the irrigation season in 2007 is the Twin Falls Canal Company. Because all storage accounts are predicted to nearly fill in 2007, with the exception of Ririe, it is reasonable to conclude that IGWA will be able to acquire sufficient storage water to mitigate for material injury that is predicted to occur to the Twin Falls Canal Company. By acquiring storage water that is located above the points of diversion for the Twin Falls Canal Company, IGWA should be able to fulfill the commitment it pledged in its 2007 Replacement Water Plan: “to mitigate any and all material injury by guaranteeing and underwriting Twin Falls Canal Company’s irrigation season supply . . . . The calculated water debt resulting from Twin Falls Canal Company’s irrigation season diversions will be replaced by the Ground Water Districts during or at the end of the irrigation season from storage water procured by the Ground Water Districts which will be credited to the storage water account of Twin Falls Canal Company. The replacement water will be delivered to Twin Falls Canal

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<sup>14</sup> When reservoir storage space refills, an amount of water equal to increased reach gains from curtailment during the prior non-irrigation season cannot be stored. Therefore, an equivalent amount of replacement water is not required. Whether there is material injury caused by depletions to reach gains from the exercise of junior priority ground water rights during the irrigation season following the refill of storage is determined in that irrigation season. Any such material injury must be offset by additional curtailment or replacement water, separately or in combination.

Company as it is needed during the irrigation season . . . .” *2007 Replacement Water Plan* at p. 8. If IGWA and its member ground water districts fail in the commitment to the Surface Water Coalition, and they do not provide timely replacement water, the Director should order immediate involuntary curtailment of junior ground water rights. Therefore, the Director should conditionally approve IGWA’s 2007 Replacement Water Plan, and involuntary curtailment of junior ground water rights in Water District Nos. 34, 110, 120, and 130 should not be ordered at this time.

5. As stated in the Findings of Fact, the predicted carryover shortfalls are 43,017 acre-feet for the American Falls Reservoir District No. 2, and 38,400 acre-feet for the Twin Falls Canal Company. Providing this carryover water is an obligation that IGWA and its member ground water districts must meet in 2008. Therefore involuntary curtailment should not be required at this time to meet this obligation. Mitigation debits and credits resulting from year-to-year mitigation will continue to accrue and carry forward until such time as the storage space held by the members of the Surface Water Coalition under contract with the USBR fills. At that time, any remaining debits and credits will cancel.

6. The Director should continue to monitor water supply and climatic conditions in 2007 and require additional replacement water, or involuntary curtailment if replacement water cannot be secured.

7. Based on the predicted fill of all storage accounts other than Ririe, it is reasonable to conclude that IGWA should be able to provide replacement water to the members of the Surface Water Coalition that are predicted to experience material injury in 2007. Because the 2007 Replacement Water Plan should mitigate material injury experienced by members of the Surface Water Coalition, the Director should deny at this time the Surface Water Coalition’s motion to dismiss IGWA’s 2007 Replacement Water Plan.

8. The Director should grant the Surface Water Coalition’s request for a hearing on its motion to dismiss IGWA’s 2007 Replacement Water Plan. In the event that any member of the Surface Water Coalition experiences material injury and timely replacement water is not provided, the Director should order immediate involuntary curtailment of junior ground water rights in the affected water districts.

9. Since the predicted material injury to members of the Surface Water Coalition should be mitigated by IGWA’s 2007 Replacement Water Plan, it should not be necessary, at this time, to approve or deny the IDA or WMC agreements.

## **ORDER**

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

1. Requirements set forth in the May 2, 2005 order, as well as all subsequent orders related thereto, as applicable, are incorporated into this order.
2. No member of the Surface Water Coalition was materially injured in 2006.

3. Based on predicted shortfalls to senior natural flow and storage water rights held by the members of the Surface Water Coalition under contract with the United States Bureau of Reclamation for 2007, the Idaho Ground Water Appropriators, on behalf of its member ground water districts, shall be required to provide 58,914 acre-feet in replacement water to the Twin Falls Canal Company for its predicted material injury. The 2007 replacement water plan, as amended, by the Idaho Ground Water Appropriators, on behalf of its member ground water districts, will mitigate for the predicted material injury to members of the Surface Water Coalition and is therefore conditionally approved, pending ongoing review by the Director of natural flow quantifications and timely replacement water acquisitions.

4. If the Idaho Ground Water Appropriators, on behalf of its member ground water districts, fails to fulfill the commitments described in its 2007 replacement water plan, as amended, immediate involuntary curtailment of junior ground water rights in the affected water districts shall be ordered by the Director.

5. The Surface Water Coalition's motion to dismiss the Idaho Ground Water Appropriators' 2007 replacement water plan is denied at this time.

6. The Surface Water Coalition's request for hearing on the Idaho Ground Water Appropriators' 2007 replacement water plan, as amended, is granted.

7. The water right agreements submitted on behalf of the Idaho Dairymen's Association and the Water Mitigation Coalition are neither approved nor denied, as the 2007 predicted material injury to members of the Surface Water Coalition will be mitigated by the Idaho Ground Water Appropriators' 2007 replacement water plan, as amended. The Director will issue orders approving or denying the agreements proposed by the Idaho Dairymen's Association and the Water Mitigation Coalition at a later date.

8. The Director will continue to monitor water supply and climatic conditions through the 2007 irrigation season and issue additional orders regarding replacement water needs in 2007 or further instructions to the watermasters for Water District Nos. 34, 110, 120, and 130 should material injury be predicted to occur to rights held by or for the benefit of members of the Surface Water Coalition.

9. The Director will make a final determination of the amounts of mitigation required and actually provided after the final accounting for surface water diversions from the Snake River for 2007 is complete. To the extent less mitigation is provided than was actually required, a mitigation obligation will carry forward to 2008 and be added to any new mitigation determined to be required for 2008. To the extent more mitigation is provided than was actually required, a mitigation credit will carry forward to 2008 and be subtracted from any new mitigation determined to be required for 2008.

10. The predicted carryover shortfalls for 2008 are 43,017 acre-feet for the American Falls Reservoir District No. 2, and 38,400 acre-feet for the Twin Falls Canal Company. Providing this carryover water is an obligation that the Idaho Ground Water Appropriators and its member ground water districts must meet in 2008. Mitigation debits and credits resulting

from year-to-year mitigation will continue to accrue and carry forward until such time as the storage space held by the members of the Surface Water Coalition under contract with the United States Bureau of Reclamation fills. At that time, any remaining debits and credits will cancel.

11. All other pending requests are subsumed by and will be addressed through the process of providing a hearing. The Director will contemporaneously issue a notice setting a status conference in this matter and notice setting hearing on the Surface Water Coalition's request for hearing on the Idaho Ground Water Appropriators' 2007 replacement water plan, as amended.

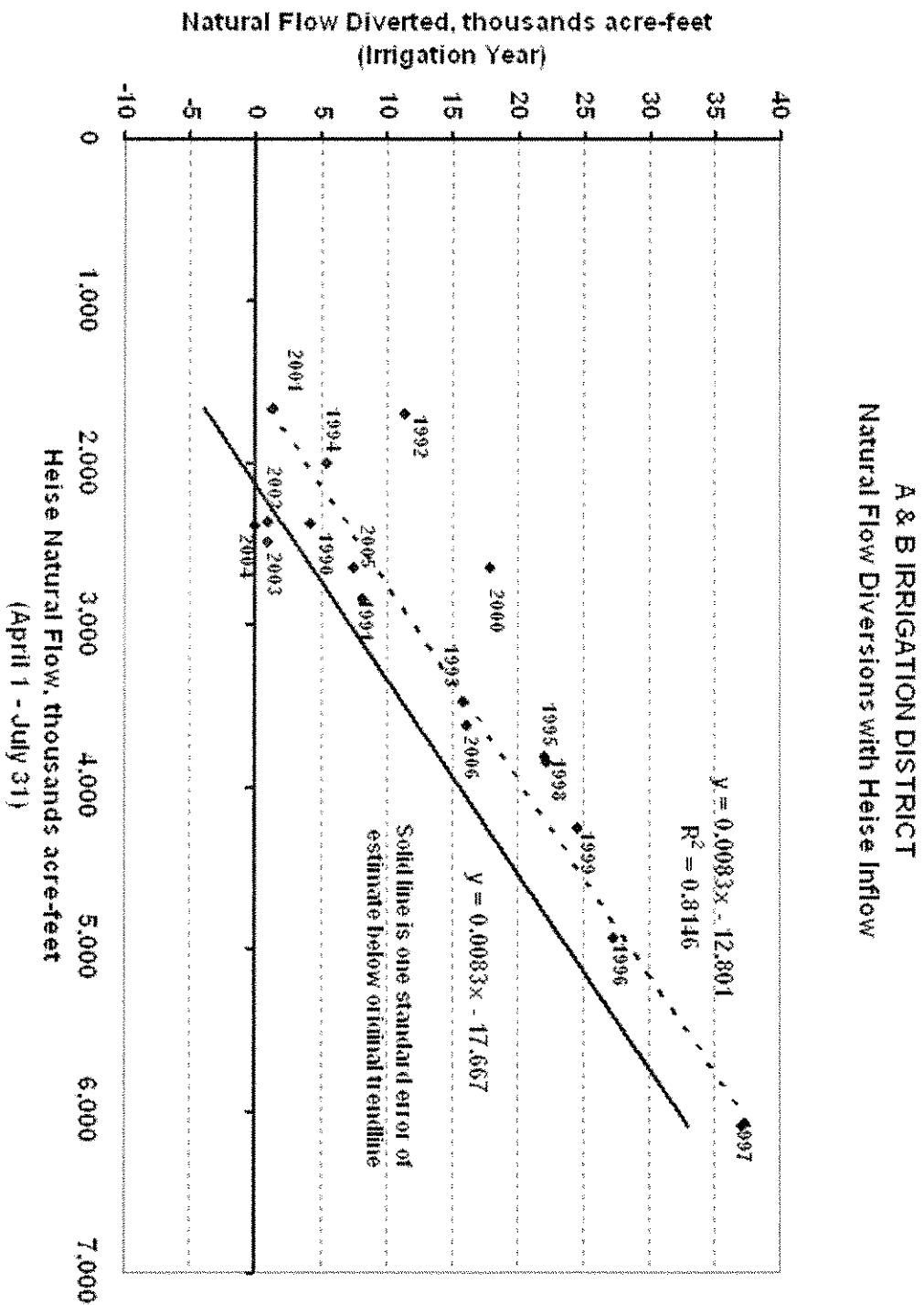
IT IS FURTHER ORDERED that pursuant to Idaho Code § 67-5247 this Order is made effective upon issuance due to the immediate danger to the public welfare posed by the lack of certainty existing among holders of water rights for the diversion and use of ground water for irrigation from the Eastern Snake Plain Aquifer as to whether water will be available under the priorities of their respective rights during the 2007 irrigation season.

IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days after receipt of written notice of the order, or receipt of actual notice, a written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Idaho Code § 42-1701A(4).

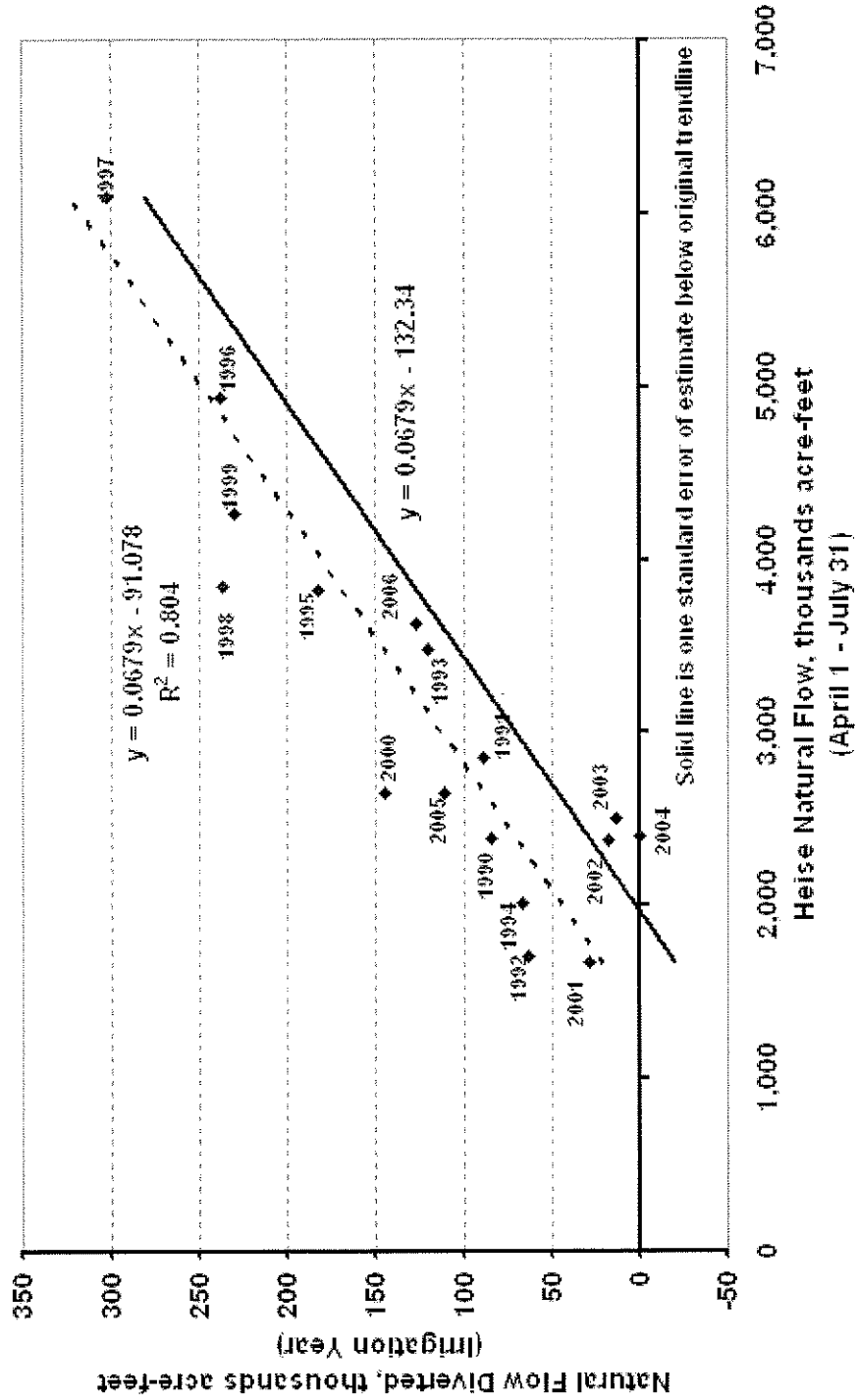
DATED this 23<sup>rd</sup> day of May, 2007.

  
\_\_\_\_\_  
DAVID R. TUTHILL, JR.  
Director



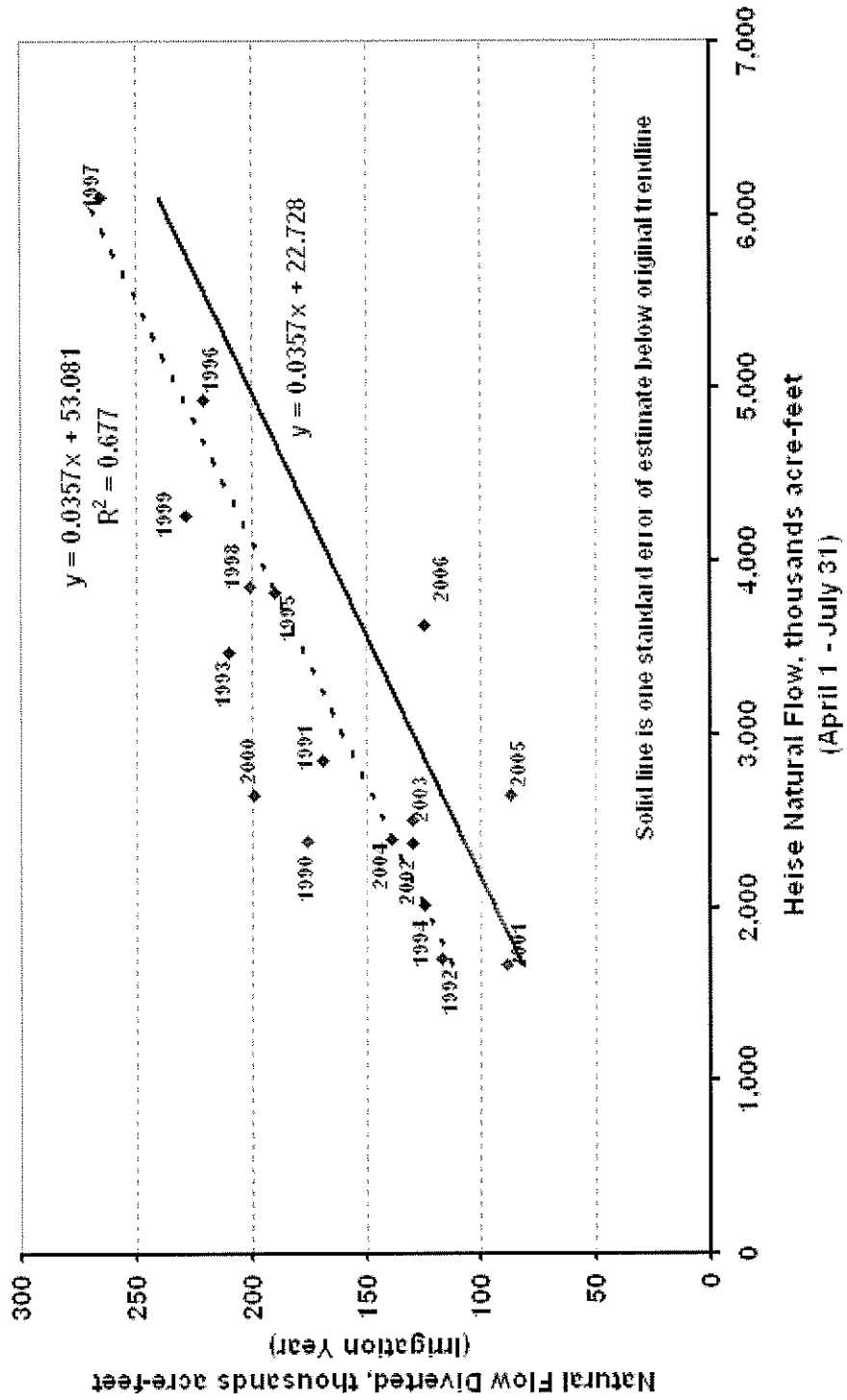
# ATTACHMENT B

## AMERICAN FALLS RESERVOIR DISTRICT #2 Natural Flow Diversions with Heise Inflow

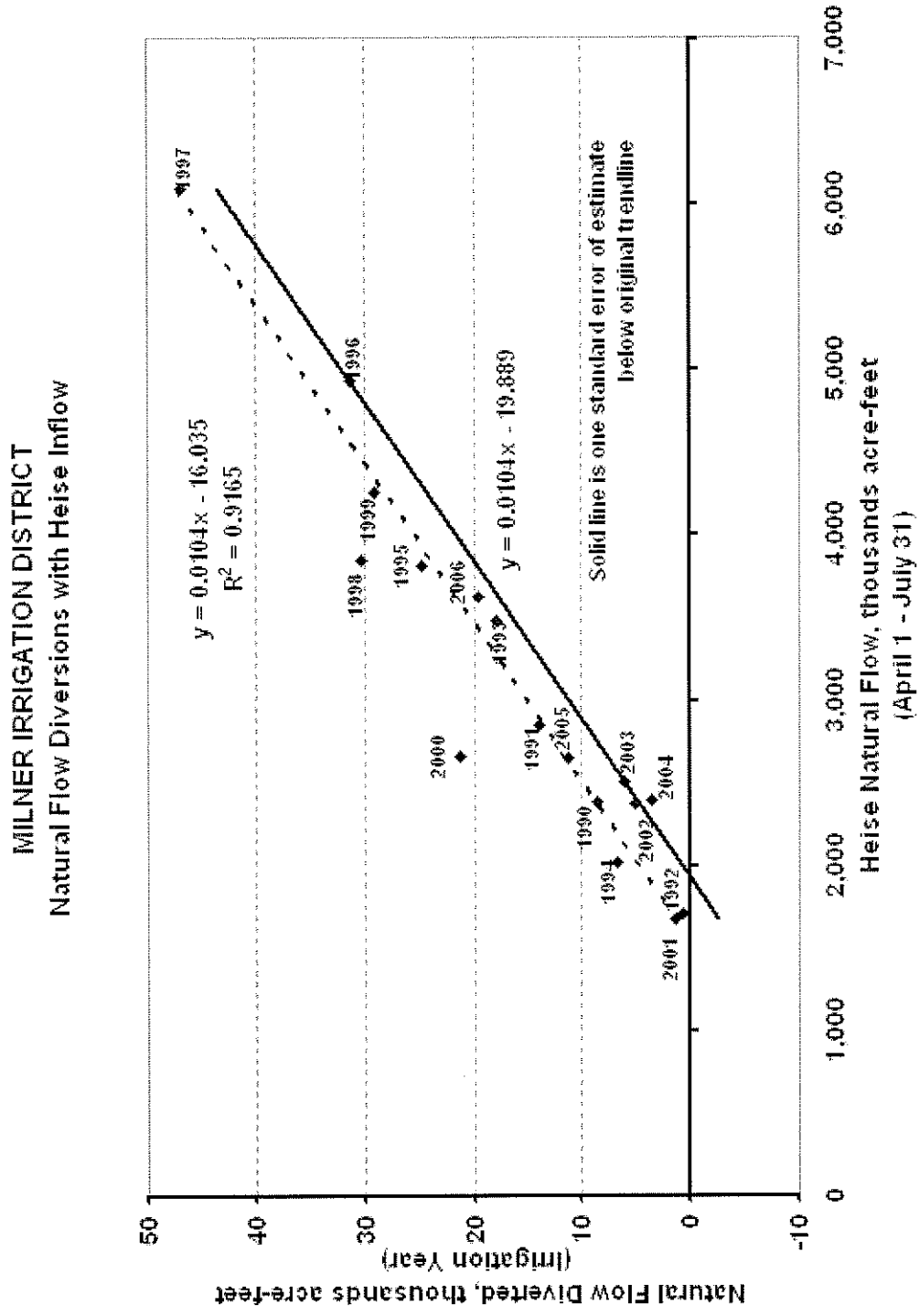


# ATTACHMENT C

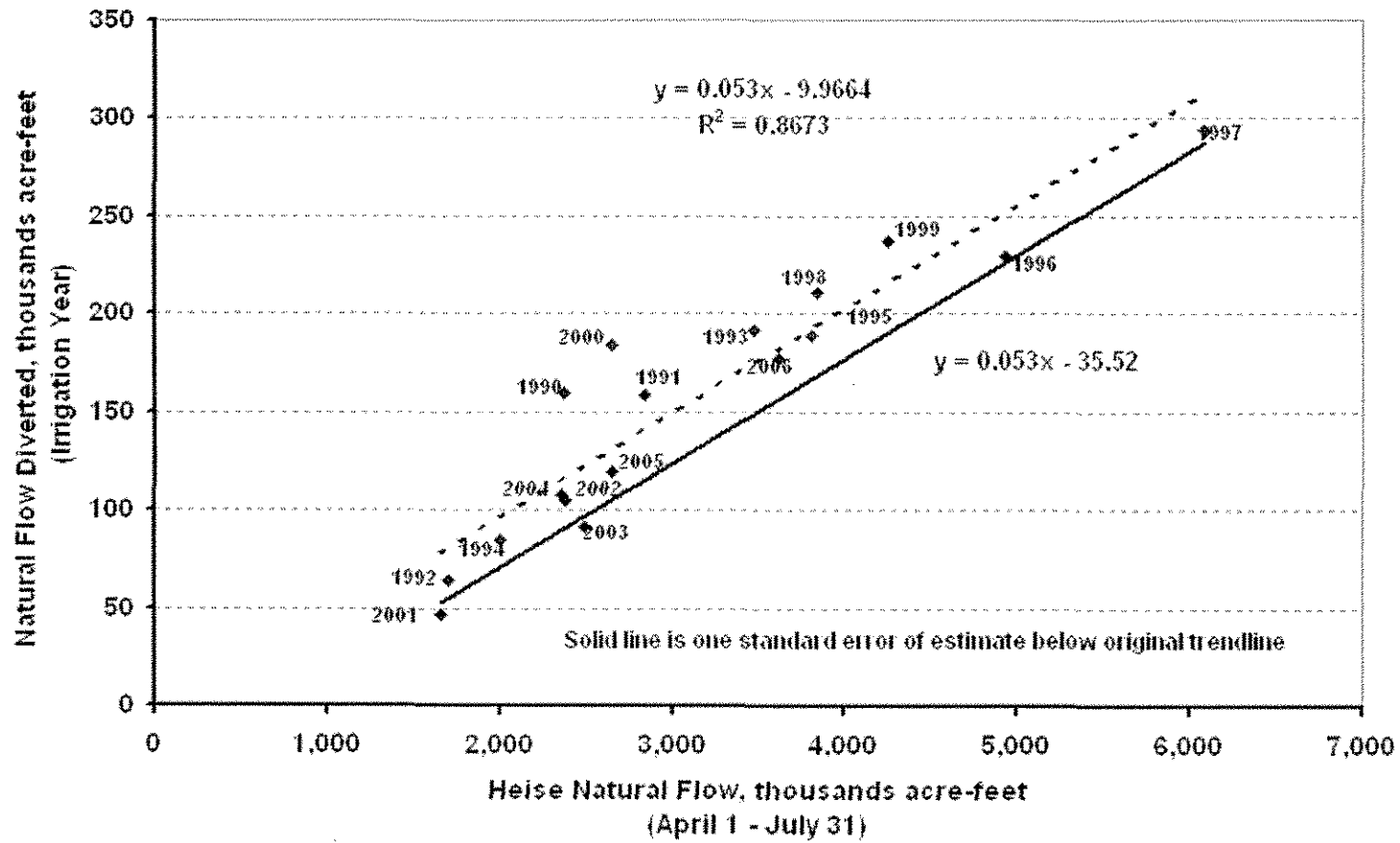
## BURLEY IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow



# ATTACHMENT D



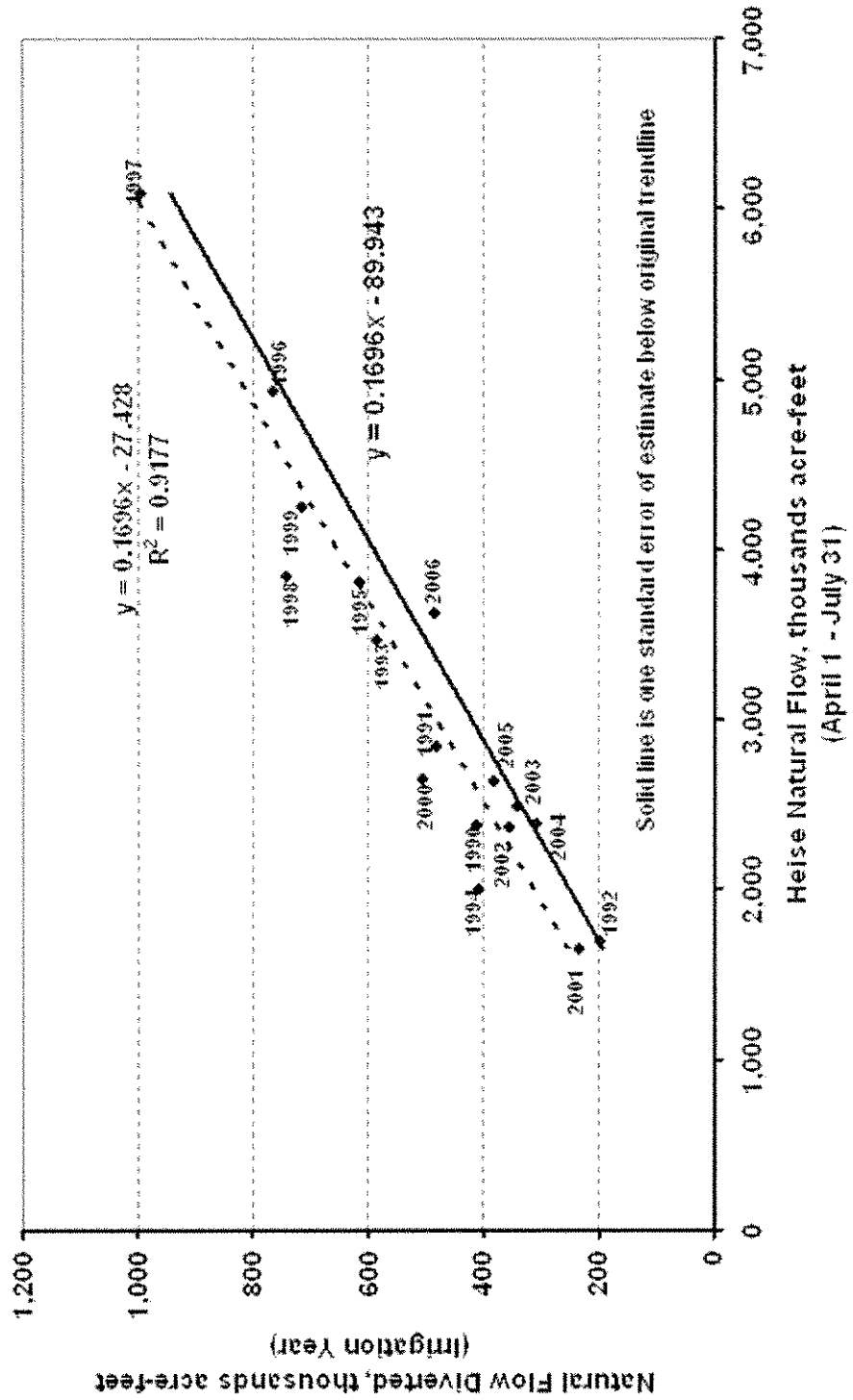
# MINIDOKA IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow

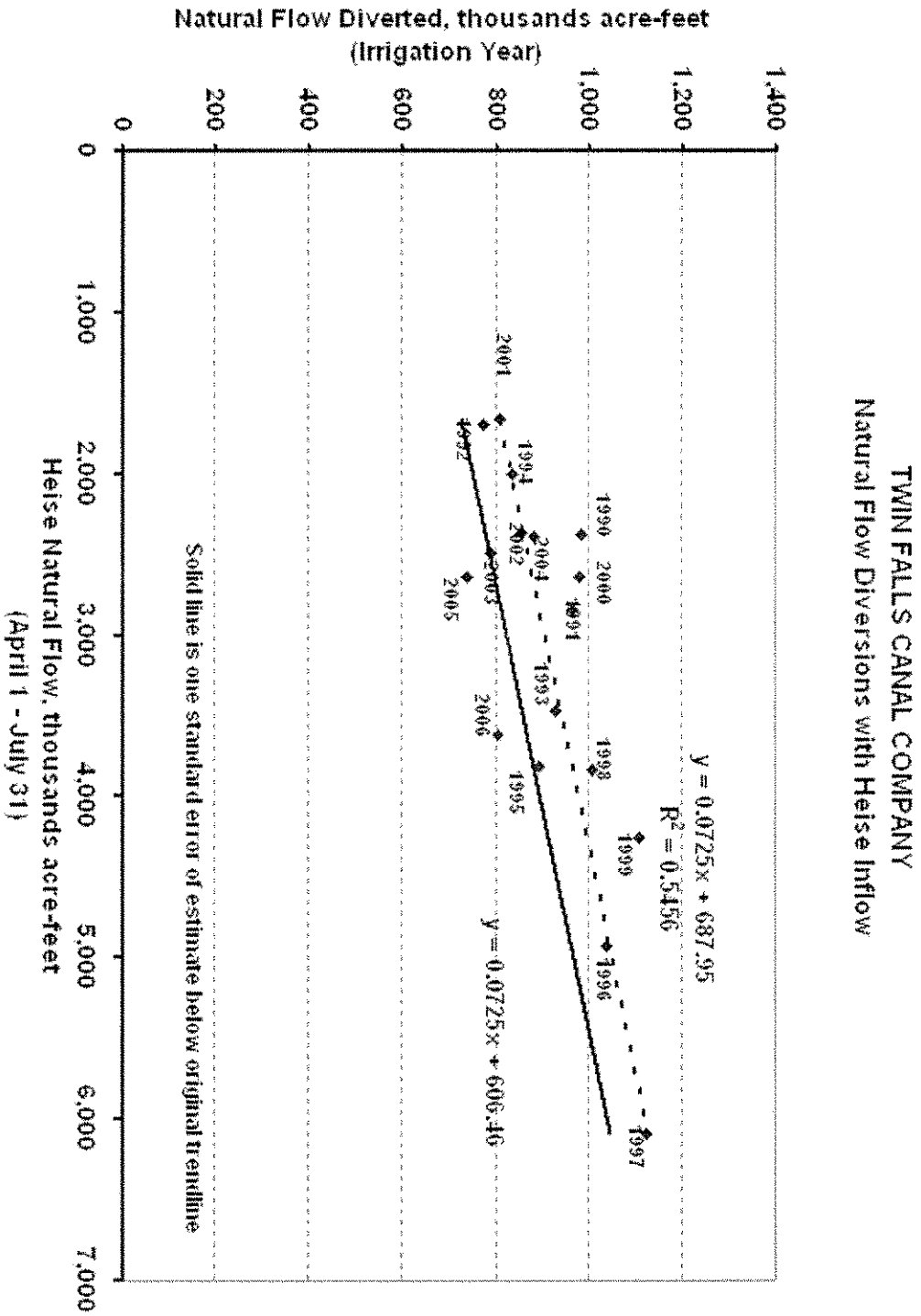


ATTACHMENT E

# ATTACHMENT F

## NORTH SIDE CANAL COMPANY Natural Flow Diversions with Heise Inflow





## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this \_\_\_\_ day of May, 2007, the above and foregoing, was served by the method indicated below, and addressed to the following:

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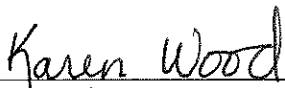
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